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IN THE

Supreme Court of the United States

October Term, 1994

CITY OF YONKERS,

Petitioner,

vs.

UNITED STATES OF AMERICA and
YONKERS BRANCH, NAACP, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

OPPOSITION TO GRANT OF WRIT OF CERTIORARI

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TABLE OF CONTENTS

Pages

I. Introduction - The Decisions Below 1

a. The district court's decision 1

b. The Court of Appeal's decision 2

II. Reasons for Denying the Petition 4

CASES CITED

Green v. County School Board of New Kent County, Va., 391 U.S. 430, 439 (1968) 3, 7

Missouri v. Jenkins, 495 U.S. 33 (1990) 6

Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S.1, 15 (1971) 2

United States v. Yonkers Board of Educ. et al., 624 F.Supp. 1276 (S.D.N.Y. 1985) 2

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Petitioner,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO GRANT OF WRIT OF CERTIORARI

I. INTRODUCTION - THE DECISIONS BELOW

Without any compelling basis or a showing that the proposed matter conforms with any of the traditional standards for the grant of its Petition, the City of Yonkers has again asked this Court to review a decision of the lower courts.

a. The district court's decision

On this occasion, Yonkers challenges the district court's (a) factually-based rejection of its motion for a modification of the long term housing plan and (b)

appointment of a Special Master to oversee implementation of the long-delayed long term housing remedy program.

Nearly nine years after the district court's landmark liability decision, *United States v. Yonkers Board of Educ. et al.*, 624 F.Supp. 1276 (S.D.N.Y. 1985), and due in substantial measure to ongoing municipal recalcitrance, only four units of affordable integrated housing have been provided to members of the class the NAACP represents. Contrary to the exaggerated representations of petitioner, unfortunately, the current municipal government has not operated in good faith and, instead, burdened its own alternative housing proposal in such a manner as to make it unfeasible and meaningless. The district court properly rejected the City's approach. And, faced with years of delay and continued politicization of this matter by municipal officers, the district court wisely appointed a Housing Special Master to coordinate implementation activities.

The district court properly used its discretion in rejecting central aspects of the city's "alternative" remedial approach. That approach over-relied on using existing housing for low and moderate income families. It did not reasonably promise to work and the City's own expert witness so conceded. Additionally, the district court found that the City proposed to under-utilize several sites agreed by all parties to be suitable for the construction of new affordable housing units. This approach, Judge Sand reasoned, would use up scarce land without appropriate return and the district court rejected this chicanery.

b. The Court of Appeal's decision

In its per curiam decision dated July 5, 1994, the Court of Appeals for the Second Circuit affirmed all aspects of the district court's decision. Citing *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S.1, 15 (1971), the Court first noted that the district court judge has had considerable

first-hand experience with the parties and is to be given broad discretion in fashioning a constitutional remedy.[1] The district court must determine whether the local government has fashioned a remedial plan that "promises realistically to work and promises realistically to work now." *Green v. County School Board of New Kent County, Va.*, 391 U.S. 430, 439 (1968) (emphasis in original). Here, upon finding the City's plan ineffectual, the Second Circuit panel reasoned, the district court was obliged to reject it in favor of a more realistic and grounded alternative which would rapidly remedy the long-adjudicated constitutional violation.

Nor, the Second Circuit held, could Yonkers complain that it was not provided an opportunity to demonstrate the efficacy of its alternative approach--concentrating on meeting its remedial obligations by using existing housing units. Instead, the record below made clear that, during the ten month trial period (July 1992-May 1993) the district court explicitly provided to determine whether Yonkers' approach would work, petitioner placed not a single family in such an existing housing unit. In this light, the district court would have abused its discretion in accepting Yonkers' empty promises that its plan would work, by some indefinite future occasion.

The Second Circuit next noted the well-established power of the federal courts to appoint Special Masters, especially where, as here, the district court retained specific authority to review any action proposed by the Master with which Yonkers disagrees. Faced with Yonkers' obstructive conduct in implementing even its own "alternative" long term housing plan, the district court "fairly concluded that a 'system which relies on consensus and mediation' has

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[1]The Honorable Leonard B. Sand has presided over all phases of this case since its filing in December 1980.

proven unreliable and ineffectual to integrate Yonkers." (A-7). The Court of Appeals finally endorsed the district court's conclusion that "effective desegregation requires a more centralized control in a single individual immune to the political pressures which have compromised the City's most recent effort at compliance." Id.

II. REASONS FOR DENYING THE PETITION

This Court should not expend its scarce resources to review this case.

1. In our appellate system, the district court makes findings of facts, subject to a clearly erroneous standard on appeal. This Court does not engage in fact-finding or disturb factual findings made below with record support.

Accordingly, the finding by Judge Sand that Yonkers plan would not remedy the constitutional violation must be respected and, with that, there is nothing for this Court to review. In January 1988, Yonkers agreed to a goal of 800 units of affordable housing to remedy the adjudicated constitutional violation. Nearly seven years later, four units have been provided. The district court has determined, as a matter of fact, that Yonkers' officials obstructed the only private concern which has made a concrete proposal to build affordable housing in East Yonkers since 1988 on "pretextual" grounds (A-72). The district court also concluded, as a matter of fact, that at most, during the next four years, Yonkers might be able to place 250 families in existing housing units and that Yonkers' officials had capitulated to racist political pressures in implementing their own alternative housing plan (A-57-58). Finally, Yonkers had proposed to construct a total of 115 units of new construction during the succeeding four years, the district court properly rejected the City's alternative plan as not meeting the remedial goal already established as "law of the case."

In its Petition, the City seeks to re-argue factual

matters properly considered and disposed of below. Mayor Zaleski, Judge Sand found, did not make good on his promise to comply with the 1986 Housing Remedy Order; rather, he proposed a plan which did not promise realistically to remedy the adjudicated constitutional violation and then specifically surrendered implementation of the existing housing program to racist elements who wished to exclude as many minorities from East Yonkers as possible (A-57-58).

The City also distorts history in asserting that either the United States or the NAACP "joined in support of the Plan." On the contrary, the NAACP denounced the plan as one tailored for persons earning incomes substantially in excess of the intended beneficiaries of the 1988 Long Term Plan order and called for increased densities at identified housing sites and less reliance on existing housing.

Likewise, in attempting to blame the Fair Housing Implementation Office for its failure to place families in existing housing during the trial period, the City distorts the findings of fact made below. Judge Sand gave the city the "green light" to go forward with its proposed plan (A-53). Instead of proceeding in a logical manner, the City did not conduct independent studies of the financial capacity of buildings it hoped to induce low and moderate income families to buy into. It instructed brokers working with it not to cooperate with FHIO. It appeared to the district court that the City's "almost . . . primary concern [was] in fixing blame on FHIO rather than moving the project forward." (A-55).[2] The Mayor established a cap of 4% affordable

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[2]Much of the City's current petition is a re-hash of arguments discredited below. For instance, Penn & Schoen found that most families on FHIO's waiting list had not been referred to housing or visited affordable housing. This was the case because no such housing was yet available, not through any fault of FHIO's.

housing units/building, thus making it practically impossible to purchase sponsor-held units (A-56-57). He also committed, contrary to New York State law, to submit the names of persons who purchased units from sponsors for approval to cooperative boards (A-58). The City did not consummate a necessary "risk-sharing" agreement with SONYMA, a state financing agency, this making illusory adequate funding for the acquisition of apartment units (A-59).

In short, as a finding of fact, not now reviewable and amply supported, Judge Sand concluded that "Yonkers Alternative Housing Plan . . . does not seek to maximize [the use of existing housing] because of self-imposed inhibitions." The court specifically concluded that "if the City continued on the present procedures in implementation of the Yonkers Alternative Housing Plan, it would be incapable of producing more than a handful of units per year." (A-60).

2. The City contends that the lower courts disrespected the principles of federalism. The City is flat out wrong. The district court may not defer to local interests and sacrifice constitutional rights when it has concluded that a violator's proposed remedial plan is illusory and shall not work. This is such a case. Yonkers is not and has not been ready, willing and able to comply with the Constitution. Thus, the City's reliance on *Missouri v. Jenkins,* 495 U.S. 33 (1990) is wholly mistaken. Proper respect for local government cannot be an excuse for further delaying the vindication of constitutional rights. Yonkers' assertions that its plan would work were thoroughly examined below and rejected.

The district court here not only gave local officials an opportunity to formulate a plan on paper. Judge Sand allowed Yonkers ten months to implement its plan and its produced no results. Judge Sand did not reject Yonkers' plan out of preconception or on the basis of abstraction.

Yonkers' own expert could not predict that the plan would yield the number of units established five and one-half years before as the agreed remedial objective.

3. Yonkers would have this Court reject *Green v. County School Board of New Kent County, supra,* and fashion a new test for assessing the remedial plans formulated by constitutional wrongdoers. The standard would no longer be whether the district court found, after review, that the plan promised to expeditiously eliminate the constitutionally offensive condition. The new standard would be whether the remedial plan was itself unconstitutional or "in any way violative of federal law." (City Petition at 17). But, these are not appropriate or applicable legal standards: the issue is whether the district court views the municipality's effort as genuine and calculated to cure the offensive condition. Here, the district court made factual findings to the contrary and these doom the City's current argument.

4. Yonkers argues next that the district court had to choose the "least intrusive remedy." This is preposterous. Yonkers was found to have violated federal statutory and constitutional laws nearly nine years ago. 624 F.Supp. 1276 (S.D.N.Y. 1985). The Court of Appeals affirmed that decision in all respects and this Court denied review. 837 F.2d 1181 (2nd Cir. 1987), cert. denied, 486 U.S. 1055 (1988). Yonkers cannot be equated with a community which has never had the opportunity, after a finding of constitutional violation, to fashion a remedy. Indeed, in early 1986, Judge Sand gave Yonkers precisely that option, but the City refused even to submit a remedy plan for consideration. And, contrary to the factual distortions Yonkers now submits, the current administration has capitulated to the same racist pressures in hamstringing the alternative housing plan.

5. This Court also should deny review to the City's objection to the appointment of a Special Housing Master, a

course first advocated by the NAACP in 1990. Appointment of such a Master is consistent with Federal Rule of Civil Procedure 53(b), this Court's precedent and common sense. Special Masters have diverse roles, not merely that of a monitor. In the Cleveland School desegregation case, for instance, the Master reorganized the district's business operations so as to free up funds for desegregation-related activities. Here, the Master is responsible for making recommendations to the district court with regard to such subjects as housing counselling; the optimal development plan for specific housing sites, as well as the most qualified developer. The modified remedy order explicitly contemplates substantial input from all parties, including Yonkers, in the work of the Master and she has so operated.

In describing the Master's role, Yonkers is apparently not content to rely on the facts. Contrary to its representation, the Master does not "select the preferred developer." Rather, the parties, including Yonkers' representatives, meet to discuss the submitted proposals and evaluate each. If no consensus emerges, the Master makes a recommendation to the district court; any party, again including the City, may challenge the recommendation. The City's claim that it only can "dissent" from this recommendation is unfair: it can file a motion on any dispute at any time and the Order carefully protects its due process rights entirely.

6. Finally, the record here demonstrates that while publicly proclaiming support for compliance with housing orders, Yonkers has continued to obstruct their implementation. The single private developer which proposed to build affordable housing in East Yonkers was defeated by a set of pretextual, racist arguments at the Planning Board level. The district court found that this administration impeded its own implementation of the Alternative Housing Plan due to the opposition of white

residents of East Yonkers who had organized the Yonkers Condominium and Cooperative Council. The City's new construction plans sought to minimize the density of site design and to insulate future residents, not integrate them with their neighbors. In each of these regards, the district court made specific findings of fact which clearly and amply refute Yonkers' current contention that the current administration is "pro-compliance" or genuinely committed to reversing the pattern of racial discrimination it unfortunately inherited. In this context, appointing a Special Master was necessary and critical. The district court did not abuse its discretion in so proceeding and this Court is requested respectfully to decline the City's Petition.

Respectfully submitted,

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